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Supreme Court, U.S.
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No. 04-775

In The
Supreme Court of the United States

BLAINE COUNTY, MONTANA; DON K. SWENSON, ARTHUR KLEINJAN, and MARY DELORES PLUMAGE, in their official capacities as members of the Blaine County Board of Commissioners; and SANDRA BOARDMAN, in her official capacity as Clerk and Recorder and Superintendent of Elections for Blaine County,

Petitioners,

v.

UNITED STATES of America,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BLAINE COUNTY'S REPLY TO THE RESPONSE OF THE UNITED STATES

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I. The U.S.'s Defense of the Ninth Circuit's Constitutional Holdings Fails.

The U.S. argues that *Mississippi Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984), is dispositive of Section 2's constitutionality because *City of Boerne v. Flores*, 521 U.S. 507 (1997), and its progeny, including *Tennessee v. Lane*, 124 S.Ct. 1978 (2004) (*Boerne* through *Lane*), do not employ a constitutional analysis different from that employed in *Brooks*. U.S. at 12-13.[1] The U.S. supports this extraordinary conclusion by observing only that *Boerne* through *Lane* have "consistently cited *various provisions* of the Voting Rights Act [VRA] as the 'prime example of a congruent and proportionate response to well documented violations of the Fourteenth and Fifteenth Amendments.'" U.S. at 12 (emphasis added).[2] However, none of these cases relied upon the legislative history considered by Congress when it enacted Section 2 in 1982. Rather, the "various provisions" were only two: (1) Section 5 of the VRA, adopted in 1965, which involved only a handful of Southern States that engaged in all manner of unconstitutional voting discrimination; and (2) Section 201 of the VRA, adopted in 1970 and extended in 1975, which involved nationwide use of discriminatory literacy tests to prevent minority registration. Moreover, because Section 2 was made prophylactic in 1982,[3] any references in *Boerne*

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[1] The U.S. overlooks that *Brooks* is inapposite because it involved a facial challenge, quite unlike Blaine County's much narrower as-applied challenge.

[2] *See also* U.S. 14, n.3: "[A]s the Court has developed *Boerne's* 'congruence and proportionality test' standard in later cases, the Court has continued to refer to various provisions of the Voting Rights Act as examples of constitutional exercises of Congress' power."

[3] Prior to 1982, Section 2 prohibited only unconstitutional conduct. *City of Mobile Alabama v. Bolden*, 446 U.S. 55, 65 (1980).

through *Lane* to the factual predicates for "various provisions" of the VRA, adopted in 1965, 1970, and 1975, are of no value with respect to Section 2. Section 2 may not be held constitutional simply because two other prophylactic sections of the VRA have been found congruent and proportionate to the legislative history supporting them.

The U.S., like the Ninth Circuit, states that Blaine County's challenge is without merit because "the amended Section 2 is constitutional even though it does not require direct proof of discriminatory intent in adopting or maintaining at-large elections," citing *Lane*. U.S. at 13-14. The U.S. attacks a strawman. Instead, Blaine County argues that *Boerne* through *Lane* very narrowly proscribe the authority of Congress to adopt prophylactic legislation like Section 2 and that Congress exceeded that authority because Section 2 is not congruent and proportionate to the historical record purportedly relied upon by Congress. Blaine County at 8-11.

The U.S., like the Ninth Circuit, states that Blaine County's challenge is without merit because Congress need not have evidence of unconstitutional voting discrimination in every State before enacting prophylactic legislation, citing *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003). U.S. at 14-15, 17. Again, the U.S. attacks a strawman. Instead, Blaine County argues that the proper factual predicate of unconstitutional voting discrimination must be found in "the States" or "most states." Blaine County at 10. Such a factual predicate demonstrates that the problem addressed by Congress is national in scope, not simply regional, such as a "problem" found in only covered jurisdictions. Findings of

voting discrimination by governments in only covered jurisdictions may not be used to justify expanding Section 2 to the remainder of the nation. The U.S. attempts to overcome this fatal defect by alleging that "there was evidence of voting discrimination in other regions as well." U.S. at 16. However, the U.S., like the Ninth Circuit, fails to substantiate this conclusory allegation.[4]

The U.S. attempts to overcome the lack of a factual predicate for Section 2 by claiming that the "government's brief supplied the court [with] numerous citations" to the legislative record on which the Ninth Circuit relied. U.S. at 17, n.4. These citations contain no references to evidence of unconstitutional voting discrimination outside of covered jurisdictions. Instead, they disclose only that Congress was dissatisfied with this Court's holding, in *Bolden*, that a Section 2 claim requires proof of unconstitutional voting practices because such proof is difficult, divisive, and unfair.

The U.S. then cites to a handful of Congressional Reports and Hearings, but fails to point out a single passage that demonstrates the existence of unconstitutional voting discrimination anywhere. U.S. at 17. Blaine

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[4] For example, the U.S. represents that Congress expanded the coverage of Section 5 to a number of additional States, including Colorado, Idaho, Iowa, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, and Utah. *Id.* Blaine County notes that these States were never covered by Section 5 preclearance provisions, nor was there ever a finding by Congress that widespread patterns of unconstitutional voting discrimination existed in those States. Perhaps the U.S. refers to the fact that, in 1975, some States or isolated counties therein, which possessed a prescribed number of non-English speaking voters, were required to print ballots in languages other than English to accommodate these non-English speaking voters. These jurisdictions were not covered by Section 5 preclearance.

County's own examination of these materials has revealed only a very few isolated incidences of alleged unconstitutional voting discrimination outside of covered jurisdictions, which fail to satisfy congruency and proportionality as required by *Boerne* through *Lane*.

The U.S. argues that a Subcommittee report relied upon by Blaine County is entitled to no credence because it "recommended against amending Section 2." U.S. at 17-18, n.4. The U.S. may not summarily dismiss the conclusion of the Subcommittee on the Constitution that "the subject of voting discrimination outside the covered jurisdictions has been virtually ignored during the hearings in each chamber," Sen. Rep. 97-417 at 171, without pointing to evidence that refutes the Committee's conclusion. The U.S. provides no such evidence.

The U.S., unable to meet the requirements of *Boerne* through *Lane*, fashions from whole cloth a previously unknown constitutional justification, neither addressed nor adopted by the District Court or the Ninth Circuit, for applying Section 2 to Blaine County:

> [R]egardless of whether Congress had before it specific evidence of discrimination affecting voting by American Indians in Montana, the evidence in this case demonstrated that such discrimination had occurred and that it was similar in kind to the evidence on the basis of which Congress had enacted and amended Section 2.

U.S. at 18. This Court requires that Congress have evidence of unconstitutional voting discrimination before it enacts prophylactic legislation, not thereafter, as the U.S. now argues for the first time. The U.S.'s novel theory is without merit and precedential support. Moreover, the U.S. does not suggest that it has evidence that Montana's at-large voting was adopted or maintained to discriminate

purposefully, which is the only factual predicate relevant under *Boerne* through *Lane*.

The U.S. attempts to discredit Blaine County's Petition by pointing out that *Muntaqim v. Coombe*, 366 F.3d 102 (2d Cir. 2004), *cert. denied*, 125 S.Ct. 480 (2004), did not hold Section 2 facially unconstitutional. U.S. at 19. Yet again, the U.S. attacks a strawman. Blaine County cited *Muntaqim* because it held that "by enacting Section 2, [Congress] chose a blunt tool. . . ." *Id.* at 124-125. Thus, *Muntaqim* held that, as applied to felony disenfranchisement laws, Section 2 is constitutionally "too attenuated" because its application to those laws, like its application to at-large voting laws, applies to "*any* law enacted at *any* time in *any* state that 'results' in the abridgement of the right to vote." *Id.* at 125 (emphasis in original). While the Second Circuit has granted rehearing *en banc* after denial of *certiorari*, *Muntaqim*, 396 F.3d 95 (2nd Cir. 2004), the panel's reasoning is still persuasive.

Thus, the U.S. fails to provide this Court with any constitutional, legal, or factual basis upon which to deny this Petition. Therefore, this Court should grant Blaine County's Petition to determine the constitutionality of Section 2 as applied to at-large voting in non-covered jurisdictions.

II. The U.S. Fails to Address Many Constitutional Errors of the Ninth Circuit.

The U.S. does not address Blaine County's arguments and reasons for granting its Petition as set forth in the following Sections thereof: Section I(B) at 7-8; Section II(C)(1) at 11; Section II(C)(3) at 13-15; and Section II(D) at 18-19. These reasons provide a sufficient basis for granting Blaine County's Petition.

III. The U.S. Must Prove Intentional Discrimination Interferes With a Minority Group's Ability Both to Participate and to Elect.

The gravamen of a Section 2 claim is the existence of intentional discrimination, past or present, public or private, that causally interacts with at-large election systems to produce an unequal ability of minority voters both to participate in the political process and also to elect candidates of choice. *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *White v. Regester*, 412 U.S. 755 (1973); and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), upon which cases Section 2 was modeled. Out of these requirements grew the 9 Senate Factors.

The U.S. argues that Section 2 does not require proof that Blaine County adopted or maintained at-large voting to discriminate against minority voters. U.S. at 21. Still again, the U.S. attacks a strawman. Blaine County argues that the U.S. must demonstrate that invidious discrimination, public or private, past or present, interacting with at-large voting, interfered with the ability of minority voters both to access the political process and also to elect candidates of choice, as required by *Whitcomb*, *White*, and *Zimmer*. The Ninth Circuit, to the contrary, held that Section 2 requires only proof of the unequal ability of a minority group to elect its candidates due to racially polarized voting, without any reference to discrimination and without reference to the group's ability to participate in the electoral process.[5] This holding conflicts with the

[5] The Ninth Circuit held: "Proof of groupwide or individual discriminatory motives has no part in a [Section 2] vote dilution claim," because any proof of "intentional discrimination among white voters is contrary to the plain language of Section 2[ ]. . . ." "We reject the notion

(Continued on following page)

decisions of this Court and with the majority of other circuits, as set out in Blaine County's Petition. Blaine County at 21-29.

The U.S. and Ninth Circuit attempt to bootstrap *Thornburg v. Gingles*, 478 U.S. 39 (1986), into something it is not, ignoring that the primary focus of *Gingles* was to determine what Senate Factor 2 meant, how it was to be determined, and the penalty for failing to prove it.[6] *Gingles* held only that, if Senate Factor 2 is not established through the three "*Gingles* factors," the case should be dismissed without proceeding to an analysis of the other factors. However, the Ninth Circuit held, and the U.S. argues, that only Senate Factors 2 and 7 are necessary to prove a Section 2 claim. App. at 10, 28, 35-36; U.S. at 21-23. This Court has held to the contrary, that the remaining 7 factors must be considered, along with any other relevant circumstance, in examining the impact of intentional past or present discrimination on access to the political process and as causation for Senate Factor 2. *De Grandy*; *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Whitcomb*; and *White*. Proof of Senate Factors 2 and 7 only avoids early dismissal, but it may not alone result in a finding of a Section 2 violation.

While the Ninth Circuit held and the U.S. argues that proof of discrimination, or an unequal ability to participate in the electoral process, is unnecessary in a Section 2

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that the district court was required to unearth evidence of discrimination in the white electorate." App. at 28. *Whitcomb*, *White*, *Johnson v. De Grandy*, 512 U.S. 997 (1994), and *Zimmer*, as well as the decisions of several circuits set out in Blaine County's Petition at 25-27 and note 15, hold otherwise.

[6] Senate Factor 2 is the "extent to which voting . . . is racially polarized."

case,[7] they observe that, if proof is necessary, some evidence of discrimination was introduced at the District Court. App. at 29-30; U.S. at 6-7, 21. They do not state that the District Court made a finding that this discrimination is connected causally to any of the Senate Factors or to present day alleged unequal access to the electoral process or unequal ability to elect candidates of choice.[8] Moreover, the few conclusory statements regarding discrimination made by the District Court,[9] vigorously contested by the parties, were brushed aside by the Ninth Circuit as unnecessary in any event, because such evidence is "not critical" and "not essential." App. at 28. This

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[7] The U.S. equivocates on this issue, trying to recharacterize the Ninth Circuit's unqualified holding. U.S. at 21. However, the Ninth Circuit's holding speaks for itself. App. at 10, 28, 34-36.

[8] The Ninth Circuit referred only to a handful of Montana Statutes, all of which were repealed by 1924, none of which were relevant because American Indians could not vote until made citizens in 1924. App. at 29-30. The remaining statutes, unremarkably, limited voting to property owners; the last of these statutes was repealed by 1963. *Id.* Importantly, none of these statutes impeded American Indian voting for candidates. There was no finding, nor has the U.S. suggested, that any of these statutes has any present impact on American Indian access to the political process or ability to elect candidates.

The only other evidence mentioned was found not in this case, but in another to which neither the U.S. nor Blaine County was a party, and in which discrimination was stipulated, not hotly contested as here. App. at 29.

Though the District Court did not discuss the testimony presented by the United States' two expert witnesses, the Ninth Circuit did. That discussion reveals that there was no evidence admitted concerning any alleged discrimination after 1959! App. at 35, n.28. Nearly all evidence concerned purported discrimination prior to 1930. App. at 29.

[9] A reading of that opinion demonstrates that there was no discussion of the facts upon which the conclusions were based, and no discussion whatsoever of the extensive facts presented by Blaine County to the contrary.

Court has held otherwise in *Whitcomb*, *White*, *De Grandy*, and *Georgia v. Ashcroft*, *supra*.

IV. The U.S. Must Demonstrate an Addressable, Unique Minority Group Interest.

The Ninth Circuit held that bloc voting alone is determinative of political cohesion without regard to the existence of addressable, unique minority group interests. App. at 24. The U.S. and the Ninth Circuit ignore that *Whitcomb* and *Gingles* require identification of distinctive or unique minority group interests for a finding that a minority group has demonstrated political cohesion. *Whitcomb* even identified many of the "unique" interests that must be present. *Id.* 403 U.S. at 135 n.12.

While the U.S. suggests that the District Court found such distinctive interests, U.S. at 5, it argues that such interests are irrelevant. U.S. at 23-25. Moreover, the District Court did not identify a single such interest, did not discuss why such an interest was unique, and did not explain how Blaine County could address it. App. at 47. Moreover, the District Court did not discuss Blaine County's considerable contrary evidence.

The U.S. strains to distinguish *Sanchez v. Bond*, 875 F.2d 1488 (10th Cir. 1989). U.S. 24. To be sure, *Bond* did find that the "reasons minority voters may not vote alike is unimportant." However, the Tenth Circuit was not, as the U.S. implies, addressing political cohesion. *Id.* at 1493. Rather, it was addressing only the limited question of "whether . . . the minority group votes as a bloc." *Id.* The Tenth Circuit recognized that, while bloc voting may "indicate[] political cohesion," *id.*, additional testimony concerning motivation is "required if the court is to identify the presence or absence of distinctive minority group

interests." *Id.* at 1494. The U.S. omitted this last sentence. The U.S. also fails to distinguish or address this Court's holdings in *Whitcomb*; *Gingles*; or *N.A.A.C.P. v. City of Columbus*, 850 F.Supp. 404 (D. S.C. 1994), *aff'd as modified on other grounds*, 33 F.3d 52 (4th Cir. 1994) (*per curiam*); all requiring the presence of addressable, distinctive minority group interests for a finding of political cohesion even if bloc voting were proved.

The U.S.'s attempt to characterize *Old Person v. Cooney*, 230 F.3d 1113 (9th Cir. 2000), as supportive of its position, is unfounded. U.S. at 24. *Old Person* supports Blaine County's position. *See* Blaine County at 28. Furthermore, *Sanchez v. State of Colorado*, 97 F.3d 1303 (10th Cir. 1996), does not support the Ninth Circuit's position, as claimed by the U.S. U.S. at 24. Rather, it, like *Gingles* and *Whitcomb*, requires that at-large voting must "thwart[] distinctive minority group interests." *Id.* at 1312.[10]

CONCLUSION

This Court should grant Blaine County's Petition.

Respectfully submitted,

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[10] While *Sanchez*, 97 F.3d at 1312, purports to distinguish *Bond*, *Sanchez* simply ignores the clear language of *Bond*, which speaks for itself. *Bond*, 875 F.2d at 1494.